

Importance of Payment Morality in the Polish Bankruptcy Law

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Consumer bankruptcy has been functioning in the Polish legal system since 2008². The serious amendment to the provisions on consumer bankruptcy was made by the Act of 30 August 2019 amending the Act - Bankruptcy Law and some other acts (Journal of Laws 2019 item 1802). On December 5, 2008, the Polish Parliament adopted the act amending the Bankruptcy and Reorganization Law Act³. The subject of this amendment was a new, separate bankruptcy proceeding referred to as consumer bankruptcy. The Act of December 5, 2008 did not provide sufficient consumer protection.

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² R. Adamus, Bankruptcy and Restructuring Law in Poland, *Societas et Iurisprudentia* 2019, vol. VII, issue 2, Trnava, Slovakia, p. 19 – 49, R. Adamus, Consumer bankruptcy in Poland, *International and Comparative Law Review*, Olomouc 2011, vol. 11, no. 2, p. 107 – 120

³ P. Tereszkiwicz, Postępowanie upadłościowe i oddłużeniowe dla konsumentów w Stanach Zjednoczonych i niektórych krajach europejskich, *Transformacje Prawa Prywatnego* 2000, No 1–3 (part I) i no 3 (part. II). W. Szpringer, Kredyt konsumencki i upadłość konsumencka na rynku usług finansowych UE, Warszawa 2005, p. 74–76, S. Gurgul, Postępowanie upadłościowe wobec osób fizycznych nieprowadzących działalności gospodarczej – cz. I, *Monitor Prawniczy* 2009, No 10, p. 527, C. Zalewski, Nowelizacja prawa upadłościowego i naprawczego, *Przegląd Prawa Handlowego* 2009, no 5, p. 4, R. Adamus, A. J. Witosz, A. Witosz, Upadłość konsumencka. Komentarz praktyczny, Warszawa 2009, R. Adamus, Wierzytelności banku w upadłości konsumenckiej, *Jurysta* 2009, No 3- 4, p. 41, C. Zalewski, Nowelizacja prawa upadłościowego i naprawczego, *Przegląd Prawa Handlowego* 2009, No 5, p. 4; P. Zimmerman, Prawo upadłościowe i naprawcze. Komentarz, Warszawa 2012, p. 981; A.J. Witosz, Plan spłaty wierzycieli w upadłości konsumenckiej, *Monitor Prawniczy* 2010, No 10, p. 584; K. Michalak, Ogłoszenie upadłości osób fizycznych nie prowadzących działalności gospodarczej na podstawie znowelizowanej ustawy Prawo upadłościowe i naprawcze, *Transformacje Prawa Prywatnego* 2009, No 3-4, p. 67; A. Witosz, Przekształcenie przedsiębiorcy jednoosobowego w jednoosobową spółkę kapitałową a problem zdolności upadłościowej, *Przegląd Prawa Handlowego* 2013, no 4, p. 4; A.J. Witosz, Likwidacja własna masy upadłości przez konsumenta, *Monitor Prawniczy* 2009, No 19; A. J. Witosz, Skutki prawne upadłości wspólnika spółki osobowej, *Przegląd Prawa Handlowego* 2014, No 4, p. 8; W. Głodowski, A. Hrycaj, Postępowanie w przedmiocie ogłoszenia upadłości konsumenckiej, *Ruch Prawniczy Ekonomiczny i Społeczny* 2011, No 3, p. 113; W. Głodowski, Zakres podmiotowy i podstawy ogłoszenia „upadłości konsumenckiej”, *Państwo i Prawo* 2010, No 2, p. 70; O. Zachmielewska, Upadłość konsumencka w świetle domniemania racjonalności ustawodawcy, *Państwo i Prawo* 2010, p. 96 R. Adamus, A.J. Witosz, A. Witosz, Upadłość konsumencka. Komentarz praktyczny, Warszawa 2009; R. Adamus, Wierzytelności banku w upadłości konsumenckiej, *Jurysta* 2009, No 3–4, p. 41; R. Adamus, Bank wobec upadłości konsumenckiej swojego dłużnika, *Monitor Prawa Bankowego* 2011, No 2, p. 53; R. Adamus, Likwidacja masy upadłości. Zagadnienia praktyczne, Warszawa 2014, p. 22; B. Świecka (editor), Bankructwa gospodarstw domowych. Perspektywa ekonomiczna i społeczna, Warszawa 2008, K. Falkiewicz, K. Dopierała, Wady ustawy o upadłości konsumenckiej, *Fenix.Pl* 2013, No 2, p. 22 i n., A. Bunk, V. Lichter, M. Pietrzak, Upadłość konsumencka w Niemczech, *Fenix.Pl*, 2011, No 4, p. 29; M. Chajda, M. Skwarzyński, Upadłość konsumencka twórcy, in: *Własność intelektualna w prawie upadłościowym i naprawczym*, M. Załucki (editor), Warszawa 2012, p. 43; K. Babiarcz-Mikulska, Postępowanie upadłościowe wobec osób nieprowadzących działalności gospodarczej, *Przegląd Prawa Handlowego* 2011, No 12, p. 55, S. Gurgul, Postępowanie upadłościowe wobec osób fizycznych nieprowadzących działalności gospodarczej, part I, *Monitor Prawniczy* 2009, No 10, p. 527; S. Gurgul, Postępowanie upadłościowe wobec osób fizycznych nieprowadzących działalności gospodarczej, part II, *Monitor Prawniczy* 2009, No 11, p. 592; E. Kabza, Wybrane problemy upadłości konsumenckiej w świetle nowej regulacji, *Studia Iuridica Toruniensia* 2009, No 1, p. 121, P. Sokal, Postępowanie upadłościowe wobec osób fizycznych nieprowadzących działalności gospodarczej, *Przegląd Prawa Egzekucyjnego* 2009, No 8, p. 79; K. Michalak, Ogłoszenie upadłości osób fizycznych nieprowadzących działalności gospodarczej na podstawie znowelizowanej ustawy Prawo upadłościowe i naprawcze, *Transformacje Prawa Prywatnego* 2009, No 3-4, p. 67; M. Jaślikowski, Podstawy ogłoszenia upadłości konsumenckiej w praktyce sądów powszechnych, *Prawo w Działaniu*, 2011, No 10, p. 45.

³Print No. 556 of the Sejm of the Republic of Poland of the 6th term

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In practice, many problems resulted in the correct formulation of the bankruptcy petition due to its considerable formalism. In addition, provisions on consumer bankruptcy did not exclude the application of Article 13 B.L. about the need to have assets to cover the costs of the proceedings.

In the justification of the bill of December 5, 2008, there were highlighted certain trends in European legislation in the field of consumer bankruptcy. It was noted that "no open access to bankruptcy debt is anticipated. On the contrary, accessibility is limited to those debtors who are considered worthy of such access. As a result of this approach, there is a tendency in Europe to attribute moral categories to excessive consumer indebtedness and to access to debt relief programs"⁴. Further, there was indicated the crucial role of mandatory debt repayment plans. "Debt relief is subject to conditions or is not granted prior to the implementation of the repayment plan, lasting five to seven years." Lastly, it was noted that "the European model places particular emphasis on debt-related advisory services. Counseling aims to rehabilitate the debtor, educate him economically and change his lifestyle as well as cause that the debt will be repaid as much as possible. Advisory services for debtors are an integral part of the debt relief procedure. The ways of implementing this assumption differ in the legislation of different European countries, but generally speaking, debt relief laws require indebted consumers to seek advice and negotiation or mediation with creditors before filing for bankruptcy or debt relief to solve the debt problem. Contrary to the legal solutions regarding consumer bankruptcy adopted in North America, European laws take into account moral issues when determining the availability of debt relief procedures, which is expressed by the obligatory repayment plan and advice for debtors. These provisions arise from the assumption that under European law, excessive debt is understood as a social problem and not as a market failure"⁵.

The next milestone in the debt relief for natural persons is the Act of August 30, 2019. The date of entry into force of the core of this amendment is March 24, 2020. First of all, the most important change seems to be the abandonment of the need to examine the so-called the payment morality of the debtor, including the debtor's fault in bringing or deepening insolvency by the bankruptcy court at the stage of declaring bankruptcy. The explanatory memorandum to the draft law states that the former solutions allowing dismissal of the bankruptcy petition on the basis of the finding that the debtor had no payment morality "are the reason for significant judicial differences in individual court districts, contributing to the phenomenon of >tourism< bankruptcy in the country"⁶. However, this does not mean giving up the importance of payment morality for the possibility of debt relief for an insolvent natural person. "Any improper behavior of the debtor (...) will be examined at the stage of determining the repayment plan of creditors, and therefore when the behavior of the debtor can also be heard by creditors"⁷.

Modes of debt relief for an insolvent natural person through consumer bankruptcy and consumer arrangement

The entire legal structure of consumer bankruptcy is subordinated to the debt relief of an insolvent natural person. In accordance with Article 2 section 2 B.L. proceedings governed by the Act on natural persons should also be conducted in such a way as to enable remission of the debtor's obligations not performed in bankruptcy proceedings.

The legislator adopted two models of consumer debt relief due to the criterion referring to the decision factor on debt relief. First, cancellation of obligations may take place by the court order. In this model, the creditors' will whether to write off the debtor's liabilities has no causative power. The court may cancel the debtor's obligations against the will of all or most creditors. Secondly, the debt relief may take place under a consumer arrangement providing for the write-off of part of the obligations accepted by most creditors. The arrangement may be concluded after the declaration of bankruptcy (in separate proceedings conducted in accordance with the provisions of Title V of Part Three of the Bankruptcy Law Act or in ordinary proceedings) or - without declaring the debtor's bankruptcy - in proceedings for concluding an arrangement at a meeting of creditors (in other separate proceedings conducted in accordance with the provisions of the Title VI part three of the Bankruptcy Law Act). In this model of debt relief, the court's competence is limited to adjudicating on the approval of the arrangement. The regulation on the consumer arrangement is, in fact, very residual in the provisions of the Bankruptcy Law Act. The provisions of the Restructuring Law Act apply in all three of the above mentioned consumer arrangement modes.

⁴ Print No. 556 of the Sejm of the Republic of Poland of the 6th term

⁵ Print No. 831 of the Sejm of the Republic of Poland of the 6th term

⁶ Print No. 3480 of the Sejm of the Republic of Poland of the 8th term

⁷ Print No. 3480 of the Sejm of the Republic of Poland of the 8th term

Debt relief can take the form of definitive or non-definitive. The write-off of "non -definitive" obligations applies to all modes of the consumer agreement due to the possibility of repealing the agreement and the so-called conditional remission of liabilities in consumer bankruptcy.

An important feature of modern debt relief in Poland is its multiformity. The legislator presents at the disposal of an insolvent debtor - a natural person who does not run a business, several modes of debt relief.

First of all, the debtor's debts may be removed by decommitment of the bankrupt's obligations by court order after the repayment plan has been completed in separate proceedings (or in ordinary proceedings applicable to entrepreneurs, in the case referred to in Article 491¹ section 2 B.L.). It should be stressed that a repayment plan has a separate legal basis as well as a different legal significance in ordinary and separate proceedings for debt relief.

There are significant differences between the *ad quem* deadline for bankruptcy proceedings in the ordinary procedure and in the separate mode. In ordinary proceedings in accordance with Article 368 section 1 and 2 B.L. the court after completing the final division plan states the termination of the bankruptcy proceedings. The court also states the termination of the proceedings if all creditors were satisfied in the course of the proceedings. According to Article 369 section 1 B.L. within thirty days of the date of the announcement of the order terminating the bankruptcy proceedings, the bankrupt who is a natural person may submit a request to establish a repayment plan for creditors and write off the remainder of the obligations that were not met in the insolvency proceedings. On the other hand, in separate proceedings the repayment plan of the *sense largo* fulfills the functions of a list of claims and division plan as well. In accordance with Article 491¹⁴ section 8 B.L. a decision establishing a repayment plan for creditors or canceling the debtor's obligations without establishing a repayment plan for creditors or conditional cancellation of the debtor's obligations without setting a creditors repayment plan means the termination of the bankruptcy proceedings. This way of regulating the issue of termination of insolvency proceedings leads to many inconsistencies. In most cases, the debtor's debt is written off after the bankruptcy proceedings have ended.

The debt relief can take place through the write-off of the bankrupt's obligations by court order after repealing the repayment plan, which the bankrupt is unable to perform for objective reasons in separate proceedings (or in ordinary proceedings applicable to entrepreneurs, in the case referred to in Article 491¹ section 2 B.L.). The debt relief can take place through the cancellation of the debtor's obligations by court order without setting a repayment plan in separate proceedings (or in ordinary proceedings applicable to entrepreneurs in the case referred to in Article 491¹ section 2 B.L.).

The debt relief may take place pursuant to the bankruptcy court's order by way of conditional remission of the debtor's obligations without establishing a repayment plan for creditors in separate proceedings (or in ordinary proceedings applicable to entrepreneurs, in the case referred to in Article 491¹ section 2 B.L.). The debt relief may take place by way of an arrangement in separate proceedings (or in ordinary proceedings applicable to entrepreneurs, in the case referred to in Article 491¹ section 2 B.L.). The debt relief for an insolvent natural person not conducting business activity may take place in proceedings for the conclusion of an arrangement at the creditors' meeting, without declaration of consumer bankruptcy. The cancellation of obligations applies, subject to exceptions provided for by the Bankruptcy Law Act, to all obligations covered by the insolvency proceedings regardless of their legal nature (source of origin). The cancellation of obligations in consumer bankruptcy occurs on the basis of a judgment of the bankruptcy court. The cancellation of obligations is compulsory, which means that it also occurs against the will of creditors, and certainly in an independent manner. The legal effect of a final court decision on the write-off of liabilities is the loss of legal existence of the debtor's liabilities (with the "universal" meaning of the concept of liability). Debt relief is possible for socially acceptable cases - according to the axiological assumption of the legislator. If the debt is offset on the basis of an arrangement, the consent of most creditors is needed. Pursuant to the principle of *volenti non fit iniuria* (who wants has no harm), most creditors can accept the terms of the consumer agreement, regardless of the premises of payment morality. Similarly, in the case of the arrangement concluded under the Restructuring Law Act, the entrepreneur's payment morality is not analyzed. If the debt is discharged pursuant to a bankruptcy court order, then - to put it simply - the debtor must meet the criteria of payment morality.

Payment morality of the debtor and its legal importance

The importance of payment morality should be associated with the institution of debt relief. In the justification of the bill from December 5, 2008. - which very narrowly opened the possibility of the debt relief - it was pointed out that "legal regulation of consumer bankruptcy, in order to fulfill its functions and not pose a threat to creditors and the security of legal transactions, must comply with the following assumptions:

1) the debt relief must be an exception, not a rule - the debtor may use this mode only in exceptional cases and only if it guarantees that the debt will be used for a new start in life and that it will not be recklessly indebted, 2) the possibility of the debt relief is a privilege for the debtor"⁸.

De lege lata the debt relief, despite significant liberalization of regulations through subsequent statutory changes, is not of an "open" nature. In other words, the bankruptcy court when deciding on the debt relief of the bankrupt (i.e. in the case of judicial cancellation of the bankrupt's defaulted obligations) should examine - to a large extent - the so-called payment morality of the bankrupt.

Should not use the institution of the debt relief in the form of judicial cancellation of liabilities such a debtor who is deliberately in debt and then unable to satisfy creditors. A completely open debt relief option under consumer bankruptcy could promote negative social attitudes. Limiting access to debt relief should be justified. Excessive liberalization of regulations may have such negative effects as limiting the availability of bank loans and increasing their costs, increasing the market position of para-bank institutions granting loans with aggressive margins.

It has been argued in the literature that the line between consumer protection and giving privileges to consumers is difficult to grasp in legislation⁹. Consumer law should equalize the chances of a weaker participants in the market (consumers). Excessive consumer protection may cause the phenomenon of so-called moral hazard, i.e. claim attitudes and a lack of responsibility for the decisions taken, which ultimately turns against the consumer. Consumer law is also not an instrument by which consumer social protection can be implemented. Rather, such protection should be implemented within the scope of social protection law, health protection, combating unemployment, family policy, etc.

The legislator in its current wording has twice referred to the issue of the debtor's payment morality. First, in accordance with Article 491^{14a} section 1 B.L. "The court shall issue a decision to refuse to set up a creditors' repayment plan or to cancel a bankrupt's liabilities without establishing a creditors' repayment plan or to conditionally write off bankrupt's liabilities without establishing a creditors' repayment plan, if: 1) the bankrupt has led to its insolvency or significantly increased its degree in a deliberate manner, in particular by squandering the constituent parts of the property and intentionally not settling the payable liabilities, 2) within ten years before the date of filing the bankruptcy petition in relation to the bankrupt, bankruptcy proceedings were conducted in which all or part of his liabilities were written off - unless establishing a repayment plan for creditors or writing off liabilities bankrupt without setting a credit repayment plan or conditional cancellation of the debtor's obligations without setting a credit repayment plan is justified on grounds of equity or humanitarian considerations. "

Secondly, according to Article 491¹⁵section 1a B.L. stipulates as following: "If it is established that the bankrupt has led to his insolvency or significantly increased its severity intentionally or through gross negligence, the creditors' repayment plan may not be set for less than thirty-six months or more than eighty-four months."

The following conclusions can be drawn from the list of debt relief modes with the structure of payment morality. First of all, payment morality conditions the admissibility of only certain modes of debt relief. The debtor's payment morality has no legal significance in the event of debt relief under the consumer arrangement. Secondly, payment morality as a condition of the debt relief is not absolute. Equity or humanitarian considerations might be reasons for allowing a person who does not meet the criteria of payment morality to receive the debt relief. Thirdly, payment morality affects the course of some debt relief modes. The legislator - in relation to the previous regulation - did not give up the census of the debtor's payment morality, but postponed the stage of its examination from the bankruptcy decree phase to the moment when the court makes a decision on debt relief and significantly liberalized the threshold of payment morality .

⁸ Print No. 831 of the Sejm of the Republic of Poland of the 6th term

⁹ Print No. 3480 of the Sejm of the Republic of Poland of the 8th term

In accordance with Article 491^{14a} section 1 B.L. the court issues a ruling refusing to set up a creditors' repayment plan or canceling the debtor's obligations without establishing a creditors' repayment plan or conditional commissioning of the bankrupt's obligations without establishing a creditors' repayment plan in two cases. First, there is no morality payment if the bankrupt has intentionally led to his insolvency or significantly increased its degree in a deliberate manner, in particular by squandering parts of the property and deliberate failure to settle payable liabilities. In this case, the morality of payment is in the form of a deliberate failure to pay. In other words, the payment morality of the bankrupt excludes intentional fault with a direct intention to lead to insolvency.

In Polish civil law, the design of guilt refers to the French concept of guilt as a two-element structure, combining two elements: subjective and objective. In the science of law, relationships between them are differently defined. The objective element referred to as unlawfulness means that the perpetrator's behavior is inconsistent with the law or the principles of social coexistence. This is an objective category of assessment. The perpetrator can be accused of this misbehavior. The subjective element of guilt (sometimes referred to as guilt *sensu stricto*) is sometimes recognized in the sense given to him by psychological theory as a perpetrator's offensive attitude to an act, when his awareness and the will of a specific behavior are directed towards behavior contrary to the legal order or the principle of social coexistence. At present, however, the understanding of guilt according to normative theory prevails. The guilt is expressed in the possibility of accusing the perpetrator of inappropriate behavior. Therefore, the body applying the law (in this case, the bankruptcy court) will assess the perpetrator's mental attitude from the outside. It is based on comparing his behavior with a certain type of conduct. Adopting the assessment *in abstracto* theoretically prevents situations that exist in the case of using the assessment *in concreto*, where the perpetrator's psyche, his awareness, individual properties, etc. are determined. Therefore, an adequate pattern of conduct, the way of making comparisons, as well as the scope of application of the assessment *in abstracto* requires determination.

Secondly, there is no morality payment if within ten years before the date of filing for bankruptcy in relation to the bankrupt, insolvency proceedings were conducted in which all or part of his obligations were discontinued. In this case, the payment morality is in the form of no repeat default.

It should be reiterated that the premise of payment morality in the form of the lack of intentional insolvency and the lack of recidivism of insolvency applies only to certain modes of debt relief. It applies to those procedures in which the court makes a substantive decision on the cancellation of the bankrupt's defaulted obligations. In turn, the payment morality of the debtor in this form is irrelevant for those modes of debt relief in which the debtor's liabilities are written off under the consumer arrangement adopted by most creditors.

The above premises are not absolute. The court does not apply them if the establishment of the creditors' repayment plan or the cancellation of the debtor's obligations without establishing the creditors' repayment plan or the conditional cancellation of the debtor's obligations without establishing the creditors' repayment plan is justified by equitable or humanitarian considerations. The normative juncture "or" indicates that the legislator used the ordinary alternative. The terms 'equity' and 'humanitarian considerations' may cross each other.

Scopes of the provisions of Article 491^{14a} section 1 B.L. and Article 491¹⁵section 1a B.L. intersect. The first of them mentions that "the bankrupt has led to his insolvency or significantly increased its degree in a deliberate manner, in particular by squandering the constituent parts of the property and intentional non-payment of due obligations". The second mentions that "the bankrupt has led to his insolvency or significantly increased his degree intentionally or through gross negligence." However, the premise of Article 491^{14a} section 1 B.L. is not absolute. This means that there may be an admissibility of the debt relief if it is justified by equity or humanitarian reasons. In this case, however, Article 491¹⁵section 1a B.L. imposes a longer repayment period.

If, in the absence of payment morality, there is no debt relief but bankruptcy funds have been accumulated in the bankruptcy proceedings, the court issues a decision establishing a repayment plan for creditors, in which he lists the creditors participating in the repayment plan and divides the funds of the estate of bankruptcy between creditors participating in the repayment plan (Article 491^{14a}section 2 B.L.).

Prerequisites for the length of exercising of the repayment plan

The length of exercising of the repayment plan is significant from the point of view of the debt recovery function of this plan as well as the preventive and educational function. The duration of the repayment plan depends on two circumstances. First, it depends on the debtor's payment morality. Secondly, it depends on the degree of satisfaction of creditors under the repayment plan. The period of fulfillment of the repayment plan is not strictly marked: on the contrary, it is flexible and gives the court a certain margin to decide within the limits provided for by

the legislator. Repayment periods include the period from the expiry of six months from the date of declaration of bankruptcy to the date of determining the repayment plan for creditors, unless the debtor would not cover in full the costs of the proceedings temporarily incurred by the State Treasury. The repayment period does not include the period of conditional remission of the debtor's obligations without establishing a repayment plan for creditors (Article 491¹⁵section 1d B.L.).

If it is established that the bankrupt himself has led to his insolvency or significantly increased its degree intentionally (*dolus*) or through gross negligence (*culpa lata*), the creditors' repayment plan may not be set for a period shorter than thirty six months or longer than eighty four months. The task of the court is to examine whether the debtor has made him insolvent or significantly increased its degree intentionally or through gross negligence. In other words, it is about examining whether the debtor is at fault for his financial status.

The culture of consumption and suggestive advertising campaigns for loans and advances undoubtedly favor debt. The literature on the subject indicates that at present the consumer does not behave as *homo aeconomicus* - he does not use reasonable economic calculation, he does not forecast the future (in particular with long-term liabilities), he assesses his financial capabilities from the perspective of current financial possibilities and the current macroeconomic environment, and both these factors are variable in the long perspective. In determining fault, circumstances such as age, education, emotional maturity, mental condition, etc. are relevant.

From the circumstances excluding the guilt (in terms of the subjective element), due to the fact that it can be attributed to a person who has a sufficient degree of discernment and sufficient freedom to direct his conduct, mention the state of insanity, provided that it results from an internal reason, completely excludes conscious or free taking decision and expression of will is permanent. If the debtor is a minor, under 13 years of age, then the minor's age excludes guilt in leading to insolvency or a significant increase in his condition.

It should be added that this is about the debtor's own fault. If it is the statutory representative that caused the replaced person to become insolvent or significantly increased its degree intentionally or through gross negligence, this circumstance does not deprive the debtor of the attribute of payment morality.

The intentional guilt (intentional fault, *dolus*) occurs when a person acts with a deliberate intention, i.e. wants to commit a violation (*dolus directus*) or, by anticipating such a possibility, agrees to it (*dolus eventualis*).

As the legislator has used the terms of the previous regulation in the new text of the Act, it is justified to refer to earlier case law. There is an interesting argument in the ruling of the District Court in Szczecin of April 29, 2016: "willful guilt can be attributed to the debtor when he takes several loans, knowing that he will soon lose the source of income, and the funds obtained in this way will be transferred to third parties or will squander and then submit a debt relief application. (...) "¹⁰

Guilt may be unintentional in the formula of recklessness, where a person has an idea of the effect of the violation, but he unreasonably supposes that he will avoid it. Carelessness is a form of unintentional guilt. In such a situation, a person has no idea as to the effect of not having their right action, even though he could and should have had it. Negligence is graded to ordinary and gross. Gross negligence (*culpa lata*) is understood as failure to comply with the minimum (elementary) rules of correct behavior in a given situation. This issue is related to the issue of the subjective element of guilt. In the ruling of the District Court in Bydgoszcz of July 5, 2018¹¹, there is an opinion that "every natural person should assess not only current ability to perform obligations, including income and savings, but also, looking ahead, make a kind of probable anticipating of future situation. (...) Gross negligence is therefore a qualified form of lack of diligence in anticipating the effects of an action". In the ruling of the District Court in Szczecin of April 29, 2016¹² it was argued that "the classification of the debtor's behavior as gross negligence is prevented, for example, by incorrect information on the basis of which the debtor made a decision or the fact that the debtor was forced into careless behavior by the conditions in which he acted or factors internal (e.g. age, illness). An example of gross negligence is the behavior of the debtor, who takes out loans significantly exceeding his earning potential at the time of granting them, in the absence of prospects for improving the current situation. According to a reasonable assessment, he should take into account that in the near future - without additional debt - he will not be able to service his debt (...). When assessing the behavior of the debtor and comparing it with the standard type of

¹⁰ VIII Gz 16/16

¹¹ VIII Gz 117/18

¹² VIII Gz 16/16

conduct, one can make an accusation (...) that he should have had an idea as to what his behavior and increasing debt could lead to. (...). " In the ruling of the District Court in Częstochowa of April 28, 2017¹³, it was indicated that "from the evidence gathered in the case, it appeared that the debtor incurring further obligations (...) did not analyze his situation and financial capabilities. (...) the installment of his obligations was almost at the level of all of his monthly salary and by incurring more obligations (...) his obligations exceeded his salary.

The Court does not share in this respect the applicant's argument that he was counting on getting allowances or promotion that would significantly increase his salary. (...) The debtor should therefore only count on the monthly salary he receives, and not make the repayment of increasingly larger liabilities dependent on allowances whose payment was not regulated in any way, as well as promotion, for which the debtor did not receive any proposal. Therefore, the debtor made repayment of increasing liabilities dependent on obtaining funds which he was not sure of receiving, and despite that he incurred further obligations. Such behavior cannot be called anything other than gross negligence." If it is established that the bankrupt did not lead to his insolvency or significantly increased its degree intentionally (*dolus*) or as a result of gross negligence (*culpa lata*), the creditors' repayment plan is established within a period not exceeding thirty-six months (Article 491¹⁵ section 1B.L). In other words, if the debtor's insolvency or extension of its scope was not guilty (e.g. arising as a result of a serious illness, the exclusive action of third parties, e.g. theft, setting fire to property, beating resulting in incapacity for work, natural disaster, etc.) or even it was culpable but the fault took a different form from intentional fault (*dolus*) or gross negligence (*culpa lata*), i.e. it was ordinary negligence, then repayment plan is established within a period not exceeding thirty-six months.

In case if it is established that the bankrupt has led to his insolvency or significantly increased its degree intentionally (*dolus*) or through gross negligence (*culpa lata*), the creditors' repayment plan may not be set for a period shorter than thirty six months or longer than eighty four months (Article 491¹⁵ section 1a B.L.). The specific time period for performing the repayment plan set in months is at the discretion of the judge. In accordance with Article 491¹⁵ section 4 B.L. the court is not bound by the opinion of the bankrupt and creditors as to the content of the creditors' repayment plan. Nevertheless, when establishing the repayment plan for creditors, the court takes into account such guidelines as:

- a) the earning potential of the bankrupt,
- b) the need to support the bankrupt and his dependents and their housing needs,
- c) the amount of outstanding claims
- d) and the degree of satisfaction of claims in bankruptcy proceedings,

The legislator adopted the following solution : the scope of effectiveness of satisfying creditors leads to a reduction in the length of fulfillment of the repayment plan even if the bankrupt does not meet the criteria of payment morality. If, by way of fulfillment of the creditors' repayment plan, the debtor repays at least 70% of the obligations covered by the creditors' repayment plan, the creditors' repayment plan may not be established for a period longer than one year (Article 491¹⁵ section 1b B.L.). If, by way of fulfillment of the creditors' repayment plan, the debtor repays at least 50% of the obligations covered by the creditors' repayment plan, the creditors' repayment plan may not be established for a period longer than two years (Article 491¹⁵ section 1c B.L.).

¹³ VGz49/17